PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 04-0555-T-P

AT&T COMMUNICATIONS OF WEST VIRGINIA, INC.
Petition for a declaratory ruling to further define who can request changes to telephone service.

CONSUMER ADVOCATE DIVISION'S EXCEPTIONS TO THE ALJ'S JANUARY 14, 2005 RECOMMENDED DECISION

Pursuant to *W. Va. Code* ' 24-1-9(c), the Consumer Advocate Division of the Public Service Commission ("CAD") files exceptions to the Administrative Law Judge=s ("ALJ") January 14, 2005 recommended decision granting AT&T Communications of West Virginia, Inc. ("AT&T"), and Verizon West Virginia Inc. ("Verizon-WV") (collectively, the "Carriers"), a waiver from the "customer of record" requirements in Section 2.8.b of the Commission's *Rules and Regulations for the Government of Telephone Utilities,* 150 C.S.R. Series 6 ("*Telephone Rules*"). In addition, to the extent the ALJ deferred ruling on the Carriers' request for a declaratory ruling expanding the scope of persons covered by the term "customer of record" in *Telephone Rule* 2.8.b, CAD urges the Commission to deny the Carriers' request rather than remanding this issue to the ALJ for a decision.

I. INTRODUCTION.

The issue before the Commission is fairly narrow: Whether the ALJ erred in granting the Carriers' request for a waiver from the "customer of record" requirements of *Telephone Rule* 2.8.b. As shown below, he did – repeatedly.

As noted in both the ALJ's decision and CAD's brief, the parties'[1] Stipulation of Partial Settlement ("Settlement") addressed the telephone companies' most significant concerns in applying *Telephone Rule* 2.8.b to business and residential service. The parties agreed to allow changes to be made for business customers so long as the companies obtained the name, title and position of the individual authorizing changes on the customer of record's behalf.[2] The parties also agreed to allow changes affecting residential service to be processed when authorized by the customer's spouse. The Settlement is temporary – a "test drive" as it were. Eighteen months after its effective date, the telephone companies will file details of alleged slamming incidents. Parties then have sixty days to comment whether the relaxation of *Telephone Rule* 2.8.b's "customer of record" requirement should be made permanent or incorporated into the Commission's *Telephone Rules* as amendments.

The only issue presented to the ALJ was whether the scope of persons entitled to submit changes on behalf of residential customers under *Telephone Rule* 2.8.b should be broadened beyond customers' spouses. The Carriers want to change a residential customer's carrier or service when they receive authorization from any person claiming to be authorized to make such changes. To do this, the Carriers sought either a declaratory ruling from the Commission expanding the scope of the term "customer of record" or, alternately, a waiver from the "customer of record" requirements. Both CAD and Staff opposed the Carriers' request. The ALJ granted the Carriers the

[1] CAD, Staff, the Carriers and Sprint Communications Company, L.P.
[2] *Stipulation of Partial Settlement*, ¶ 3, p. 2 (Filed Oct. 28, 2004) ("Settlement").

waivers they sought though he declined to issue a ruling interpreting "customer of record" as the Carriers wanted.

II. THE APPLICABLE STANDARD OF REVIEW.

The Commission reviews an ALJ's recommended decision *de novo*. *See Harrison Rural Electrification Ass=n, Inc. v. P.S.C. of W.Va.*, 438 S.E.2d 782, 787 (W. Va. 1993). Under this standard, an ALJ's decision is not entitled to deference by the Commission, nor is the basis upon which the Commission may reject or modify an ALJ's decision limited by such standards as whether the ALJ's decision was "arbitrary and capricious" or based upon "substantial evidence."

III. ARGUMENT.

The ALJ's January 14, 2005 decision makes several things clear. First, the ALJ does not think much of *Telephone Rule* 2.8.b or the Commission's decision adopting that rule and other provisions of its anti-slamming regulations. Second, the ALJ is not overly concerned with following the applicable rules and Commission precedent in determining whether a waiver from, or modification of, *Telephone Rule* 2.8.b is appropriate. Third, the ALJ is not particularly concerned with whether the evidence justified granting the Carriers' waiver requests. Finally, the ALJ is untroubled that the concept of apparent authority he endorses is contrary to the law in West Virginia.

A. The ALJ Ignored Both *Telephone Rule* 2.8.b And The Commission's Decision Adopting Stringent Anti-Slamming Rules.

In their filings and testimony, the Carriers' suggested that the Commission did not appreciate the significance of its decision adopting the "customer of record" limitation in *Telephone Rule* 2.8.b and did not intend to limit the scope of persons able to authorize changes in service or carrier.[3] CAD thoroughly debunked the Carriers' suggestions.[4] Unfortunately, the ALJ chose not to analyze the language of the Commission's anti-slamming rules, the Commission's orders adopting those rules, or the Commission precedent to which he was cited.

If the ALJ had actually analyzed the Commission's rules or its decisions adopting those rules, he could not reasonably have concluded that broadening the scope of persons able to authorize changes in residential service was in the "public interest" or otherwise warranted. As CAD noted, the Commission deliberately adopted stringent anti-slamming rules and rejected suggestions that those rules should be broader or in conformity with more liberal rules adopted by the Federal Communications Commission ("FCC").

For example, the Commission rejected efforts by Verizon-WV's corporate predecessor to broaden the definition of "customer" to include "persons on whose specific and named behalf" telecommunications services are purchased – in other words, "gift billing."[5] The Commission rejected Verizon-WV's proposal on the grounds that it "weaken[ed] the definition of the term 'customer,' thereby encouraging illegal 'slamming' or 'cramming' practices."[6]

---

3 *See Verizon-WV Exh.* 2, pp. 2 & 6; *AT&T Petition*, pp. 3, 5-7 (Filed April 14, 2004).

4 *See CAD Br.*, pp. 5-15.

5 *CAD Br.*, pp. 7-8. Verizon-WV supplied the term "gift billing" in its comments filed in the rulemaking that led to the adoption of the current anti-slamming rules. *See Bell Atlantic – WV Initial Comments*, G.O. 187.16, p. 6 (Filed May 11, 1998).

6 *CAD Br.*, p. 8, *citing* "Commission Order," G.O. 187.16, pp. 9-10 (Aug. 11, 2000).

Though the Commission clearly intended a narrow definition of "customer" to discourage slamming, the ALJ did not address this point in his decision.

Nor did the ALJ address the fact that the Commission understood quite well that, by incorporating the term "customer of record" in *Telephone Rule* 2.8.b, only a very narrow class of persons could authorize service or carrier changes. CAD made it clear that "customer of record" is well understood by both the Commission and regulated utilities to mean the billed party or parties.[7] Likewise, the ALJ ignored the Carriers' concession that their interpretation of "customer of record" was broader even then the definition of "customer" set forth in *Telephone Rule* 1.7.m.[8]

With regard to the Carriers' suggestion that the Commission was ignorant of the FCC's more liberal anti-slamming rules when it adopted *Telephone Rule* 2.8.b, CAD debunked that assertion as well.[9] CAD cited specific portions of the Commission's orders in G.O. 187.16 that made it clear that the Commission was well aware of the FCC's slamming proceeding. For example, the Commission, on reconsideration, eliminated a provision of its slamming rules that would have allowed carrier changes to be verified by means of welcome packages because the FCC's rules did not allow verification via welcome packages.[10]

---

[7] *CAD Br.*, pp. 9-11.
[8] *Id.*, pp. 11-12, *citing Tr.*, pp. 90-91 (Buckley).
[9] *Id.*, pp. 13-15.
[10] *Id.*, p. 14, *citing* "Commission Order," G.O. 187.16 (Oct. 6, 2000), p. 11. Yet another portion of the Commission's August 11, 2000 order in G.O. 187.16 clearly indicated that the Commission was fully aware of the FCC's rulemaking on slamming. In their comments, the Independent Group had suggested that the Commission defer to issue slamming rules until after the FCC completed its rulemaking and even cited the Commission to the FCC rules that were eventually adopted. *See Independent Group Comments*, G.O. 187.16, pp. 3-5 (Filed May

The Commission's anti-slamming rules, the decisions adopting those rules, and Commission precedent defining "customer of record" provided the vital context in which the Carriers' arguments should have been considered. The ALJ chose not to consider those authorities in his decision.[11] Had the ALJ actually considered those authorities, he could not reasonably have concluded that granting the Carriers' the waiver they sought was in the "public interest" or that the Carriers' compliance with *Telephone Rule* 2.8.b resulted in an unreasonable hardship to their customers.

B. The ALJ Likewise Ignored *Telephone Rule* 1.6.b And Commission Precedent Regarding Both The Standards For Granting A Waiver And Who Has The Burden Of Proof.

Telephone Rule 2.8.b and other provisions of the Commission's anti-slamming rules were not the only relevant rules the ALJ ignored. He also ignored *Telephone Rule* 1.6.b, which provides both the standard to be applied in granting relief from the *Telephone Rules*, as well as the evidentiary burden utilities seeking such relief must satisfy.

As CAD noted in its briefs, *Telephone Rule* 1.6.b requires persons seeking an exemption from, or modification of, those rules to demonstrate "unreasonable hardship" results from their compliance with the rules.[12] More importantly, Commission precedent applying the rule makes it clear that the

---

13, 1998). CAD opposed the Independent Group's suggestion and the Commission ultimately rejected it. "Commission Order," G.O. 187.16 (Aug. 11, 2000), pp. 32-33. Though CAD did not cite this portion of the Commission's August 11, 2000 order in its briefs, it is doubtful that it would changed the outcome of ALJ's decision since he failed to address any aspect of the Commission's decisions in G.O. 187.16.

[11] In fact, the ALJ only referred to the Commission's rules once, recognizing that *Telephone Rule* 2.8.b does "use the word [sic] 'customer of record' in describing who is entitled to make changes to telephone service." *Rec. Dec.*, p. 2.

[12] *CAD Br.*, p. 16.

Carriers' burden of establishing an unreasonable hardship is a heavy one. In order for utilities to establish that compliance with a particular rule results in an unreasonable hardship, they must make a "clear showing" that compliance with the rule: (1) imposes an undue financial burden, (2) is impossible, or (3) would be illegal.[13] These are appropriately narrow grounds for exempting utilities from complying with, or otherwise modifying, lawful Commission rules.

CAD analyzed the evidence provided by the Carriers under each of these criteria and set forth, in detail, why the Carriers' failed to establish that the waivers they sought were warranted.[14] The ALJ disdained such an analysis. In fact, nowhere does the ALJ even acknowledge that the Carriers bear the burden of proof in demonstrating that relief from *Telephone Rule* 2.8.b is warranted.[15]

As CAD noted, much of the Carriers' evidence and testimony focused on the operational and financial difficulties associated with complying with *Telephone Rule* 2.8.b where service changes were sought by agents for business customers and residential customers' spouses.[16] While compliance with *Telephone Rule* 2.8.b no doubt imposes operational limits on the carriers that they find inconvenient or burdensome, that is hardly the standard for waiving the Commission's rules.[17] Moreover, those operational limitations were

---

[13] *Id.*, p. 16 fn. 46, *citing* "Interim Order," *Armstrong Telephone Co., et al.*, Case No. 8941 (May 16, 1977), p. 6.
[14] *Id.*, pp. 17-20.
[15] The Carriers, at least, conceded that they bear the burden of proof to demonstrate that relief from the Commission's rules is warranted. *See Tr.*, p. 174 (Starsick).
[16] *See, e.g., Tr.*, pp. 49 (Boyle); 59-60 (Buckley); *see also AT&T Exh.* 1-A, pp. 5-7 (Affidavit of Sherri Wynne, *et al.*).
[17] The ALJ cited comments by CAD's counsel that "conceded" that there had been a showing of hardship regarding spouses and business customers. *Rec. Dec.*, p. 6. As CAD made clear in its reply brief, "hardship" and "unreasonable hardship" are two different concepts and the exchange between CAD's counsel and the ALJ did not suggest otherwise. *CAD Reply*, pp. 3-5.

understood by the Commission when it adopted the "customer of record" limitation in *Telephone Rule* 2.8.b. Finally, the Settlement fully addressed those situations complained of most by the Carriers.

When it came to providing evidence that would support broadening *Telephone Rule* 2.8.b to extend to persons claiming authority to act on behalf of a residential customer, the Carriers' evidence of hardship, let alone unreasonable hardship, was practically non-existent. Apparently, the ALJ thought so too. Nowhere in his decision does the ALJ conclude that the utilities had demonstrated that compliance with *Telephone Rule* 2.8.b – beyond the provisions set forth in the Settlement – resulted in an "unreasonable hardship" *upon the utilities*. The ALJ's silence on this point is an acknowledgement that the Carriers failed to satisfy their burden to demonstrate the waiver they sought was warranted. That should have been the end of the matter but, unfortunately, it was not.

Instead of ruling that the Carriers failed to demonstrate an "unreasonable hardship" if *Telephone Rule* 2.8.b was not expanded to persons claiming authority to act for residential customers, the ALJ contrived a way around the Carriers' evidentiary problem. First, he created a new standard for granting utilities waivers from the Commission's rules, namely whether the waiver is in the "public interest." Next, he changed the focus of the inquiry from the unreasonable hardship compliance with *Telephone Rule* 2.8.b imposed on the Carriers to an analysis, utterly lacking in evidentiary support, of the unreasonable hardship the rule imposed on the Carriers' customers. In both efforts, the ALJ erred.

1. The ALJ Erred in Concluding that a Waiver is in the "Public Interest."

The ALJ concluded that the Carriers offered "convincing evidence" that a temporary waiver of *Telephone Rule* 2.8.b "to permit customers of record to authorize other responsible adults to requests [sic] changes in their service would be in the public interest." *Rec. Dec.*, p. 6. The ALJ's conclusion finds no support in the *Telephone Rules* or Commission precedent. More importantly, the ALJ's purely subjective assessment of the "public interest" is completely at odds with the public interest considered by the Commission when it adopted the current anti-slamming rules. In short, the ALJ's decision is an outright rejection of the Commission's decision to adopt stringent anti-slamming rules, based on nothing more than the ALJ's subjective assessment of a "public interest" standard that the Commission has never recognized.

a. The "public interest" is not an appropriate criterion for granting an exemption or waiver from the Commission's *Telephone Rules.*

As CAD has noted, *Telephone Rule* 1.6.b provides for the modification of a specific rule, or the granting of a temporary exemption from the rule, where compliance with the rule would result in an unreasonable hardship upon a telephone company or a telephone user.[18] "Unreasonable hardship," not "public interest," is the standard the Commission's rules mandate, and that the Commission's orders have defined.[19]

---

[18] *CAD Br.*, p. 16, *citing* C.S.R. § 150-6-1.6.b.

[19] *CAD Br.*, p. 16, *citing* "Interim Order," *Armstrong Telephone Co., et al.*, Case No. 8941, p. 6 (May 16, 1977)(considering telephone utilities' request, pursuant to then-*Telephone Rules* 1.02(2) & (3) for waivers or exemptions from rules requiring compliance with certain federal Uniform System of Accounts and annual notification of rates, charges and changes thereto).

CAD found no decision granting utilities an exemption from Commission rules based on the notion that it was "in the public interest." CAD made just this point in its briefs.[20] Nowhere in their briefs, testimony or other filings in this case did the Carriers cite any Commission decision applying a "public interest" standard to requests for relief from Commission rules. Nor did the ALJ cite any Commission decision endorsing a "public interest" standard under *Telephone Rule* 1.6.b.

b. The ALJ's assessment of the "public interest" was inappropriate.

Beyond the fact that the Commission has not adopted a "public interest" assessment for waiver requests under *Telephone Rule* 1.6.b, there are plenty of reasons for rejecting the ALJ's attempt to add an assessment of the "public interest" to the limited grounds for obtaining relief from the Commission's rules. By its very nature, the "public interest" is an amorphous concept that lacks any precise definition, often involving subjective assessments of what is best for utilities, the public and the state. Allowing ALJs to utilize a "public interest" assessment under *Telephone Rule* 1.6.b is an open invitation for them to second guess Commission rulemaking decisions, thereby jeopardizing the certainty and finality of Commission rules. The ALJ's action in this proceeding proves the point.

More importantly, the ALJ's decision to grant the Carriers a waiver from *Telephone Rule* 2.8.b based on a "public interest" assessment ignores the fact that the Commission considered the public interest in adopting that rule and

[20] *CAD Reply Br.*, p. 2.

other anti-slamming provisions in G.O. 187.16. As the Commission is well aware, the anti-slamming rules in question – including *Telephone Rules* 1.7.m and 2.8.b – were adopted only after lengthy proceedings.[21] Though the Commission did not use the term "public interest" in its order adopting final rules, it frequently cited concerns consistent with that interest.

For example, both CAD and Staff cited the ALJ to the Commission's rationale for adopting a narrow definition of "customer of record," namely its overriding desire to protect consumers from being slammed or crammed.[22] Likewise the Commission cited public interest-related concerns, namely slamming and cramming, in rejecting proposals to adopt less stringent notice requirements in its rules governing billing statements.[23] The Commission cited similar concerns elsewhere in its order.[24]

The ALJ ignored the public interest aspects of the Commission's decision to adopt stringent anti-slamming rules in G.O. 187.16. Worse, the ALJ

---

[21] The Commission adopted the rules in question in August 2000. The rules were first proposed on March 31, 1998 and statewide notice of its proposed rulemaking was made at that time. Numerous parties – including CAD, Staff, AT&T and Verizon-WV – filed both initial and reply comments in response to the proposed rules in May and June 1998. The Commission held a hearing on its proposed rules on May 19, 1998 during which counsel for these parties advocated their positions. *See* "Commission Order," G.O. 187.16, (Aug. 11, 2000), pp. 1-4.

[22] *CAD Br.*, pp. 7-8; *see Staff Exh. 5,* pp. 2-5.

[23] "Commission Order," G.O. 187.16 (Aug. 11, 2000), p. 12 ("in light of . . . the consistently high levels of customer complaints regarding 'slamming' and 'cramming,' more disclosure, not less, is sound regulatory policy;" "the regulatory and public policy underlying fuller disclosure of charges . . . outweighs the unsubstantiated cost concerns voiced by BA-WV").

[24] *See id.*, p. 17 (a less rigorous notice rule for local carriers "undercuts the Commission's policy favoring the provision of more information to customers in order to allow customers to make informed choices among competitors"); p. 36 (requiring carriers to provide a general advisory to customers when their service may have changed "is not a significant burden and will help alleviate the confusion and frustration customers experience when they are served by different carriers"); *see also* "Commission Order," G.O. 187.16 (Oct. 6, 2000), p. 2 ("simply requiring certain information to be placed on a bill, without Commission review and approval, is a less rigorous safeguard against cramming than requiring the carrier to obtain Commission approval to place the charge on the bill").

apparently believes the Commission got the public interest issues wrong. The following passage makes this point clear:

> Numerous situations exist when it would be *more than reasonable* to allow an authorized adult, who is not the billed party, to make changes in telephone service.

Rec. Dec., p. 7 (emphasis added).[25] In other words, to carry the ALJ's reasoning to its logical conclusion, the Commission's decision to limit the scope of persons able make service changes to "customer of record" was *less than reasonable*. With all due respect, this is not ALJ's call.

C. The ALJ Erred In Determining That *Telephone Rule* 2.8.b Imposes An "Unreasonable Hardship" Upon Residential Customers.

Another disturbing aspect of the ALJ's decision is the shift in the focus of his analysis, from the Carriers' alleged hardships complying with *Telephone Rule* 2.8.b to the hardships *Telephone Rule* 2.8.b supposedly imposes on the Carriers' residential customers. The ALJ's conclusions in this regard are startlingly wrong.

1. Granting Utilities a Waiver from Their Regulatory Obligations Based on the Hardship Compliance Imposes on Customers was Inappropriate.

Much of the evidence cited in the ALJ's decision focuses on the operational and financial burdens compliance with *Telephone Rule* 2.8.b

[25] Similarly, the ALJ concluded that "problems caused by the waiver *will be . . . far outweighed by the advantages* to customers who will now be able to authorize responsible adults to make changes to their service on their behalf." *Rec. Dec.*, fn. 5 (emphasis added). Here again, the ALJ substitutes his assessment of the advantages and disadvantages associated with broadening *Telephone Rule* 2.8.b for the Commission's determination that increased cramming and slamming warranted limiting the persons able to make changes to the "customer of record."

imposes on the Carriers.[26] This focus was appropriate in light of who was asking for relief from *Telephone Rule* 2.8.b (*i.e.*, the Carriers), and the evidence proffered by the Carriers in support of their request (*e.g.*, operational limitations and state-specific restrictions on marketing, etc.). Yet, as previously noted, the ALJ did not cite the burden imposed on the Carriers as the basis for granting their waiver request – instead he focused on the burden *Telephone Rule* 2.8.b imposes on the Carriers' residential customers:

> AT&T and Verizon demonstrated that *their customers face an unreasonable hardship* in attempting to get service changes in their accounts since they are not able to authorize responsible adults to make the changes on their behalf. Numerous situations exist when it would be more than

Rec. Dec., p. 7 (emphasis added).

The ALJ's focus on customers' hardship was inappropriate. No customer sought relief from *Telephone Rule* 2.8.b in this case. Moreover, no customer ever has sought relief from this rule or any other anti-slamming provision in the rules. In light of the foregoing, it was error for the ALJ to consider *Telephone Rule* 2.8.b's impact on customers in the context of the utilities' request for relief from the rule.

[26] *See, e.g., Rec. Dec.*, p. 1 ("in order to comply with the Staff interpretation of the rules, AT&T terminates telephone calls regardless of the customer's wishes . . . once it finds out it is not dealing with the customer of record), p. 2 ("The additional calls trying to reach the customer of record created an unnecessary expense for AT&T and an added intrusion upon the customer's time"), p. 3 ("Uniformity of regulation would allow Verizon's call centers to operate more efficiently"), p. 4 ("Verizon handles calls from the other three jurisdictions one way and has to handle West Virginia calls a separate way").

2. There Was No Evidence to Support the ALJ's Decision That *Telephone Rule* 2.8.b Imposes an Unreasonable Hardship on Customers.

Even if shifting the focus to residential customers' hardship was appropriate, there was absolutely no support for the ALJ's conclusion that the Carriers had provided "convincing evidence" that *Telephone Rule* 2.8.b imposed an unreasonable hardship on the Carriers' customers.

As noted during the hearing and in CAD's briefs, no customer has ever complained to the Commission – formally or informally – that *Telephone Rule* 2.8.b prevented them from making a change in carrier or service.[27] Instead, complaints submitted to the Commission by customers allege that their service or carrier had been changed by someone else, without their permission or knowledge.[28]

Nor did the Carriers submit any evidence to substantiate their assertion that residential customers are chafing to be able to have changes made on their account by anyone claiming the authority to do so. The only evidence of hardship offered by the Carriers focused on difficulties associated with making changes submitted by (a) business customers' agents and (b) the spouses of residential customers.[29] Those two situations were addressed by the parties'

---

[27] *Tr.*, pp. 138-39 (Fletcher).

[28] As Staff's witness noted: "We get complaints from a customer of record that they've been slammed . . . [and] have suffered the consequences of someone making a decision on their account that has cost them time and money." *Id.*, p. 139.

[29] For example, the affidavit of various customer service representatives introduced into evidence by AT&T spoke only of problems associated with precluding the customer's spouse from authorizing changes on the customer's account. *See AT&T Exh.* 1-A (Affidavit of Sherri Wynne, *et al.*), pp. 5-7. Likewise Sprint referred solely to problems associated with spouses being unable to make changes to the customer of record's account. *See Sprint Direct Testimony*, p. 9 (Taylor).

Settlement.[30] The Carriers attached no affidavits, statements, or any other evidence reflecting complaints from customers that they were unable to authorize someone else to make a change on their account. Nor did the Carriers introduce testimony to that effect from any customers.

Likewise, there was no evidence regarding how often carriers sought to contact customers, only to reach roommates, or children of elderly parents, or adult members of the household, domestic partners, etc. There was no evidence regarding the number of times customers contacted the carriers to complain that their roommates, domestic partners, adult children, friends, neighbors, co-workers or some other "responsible" adult had been unable to make a change that the customer wanted. Nor did the Carriers offer any evidence suggesting that residential customers who were unable to make account changes found it unreasonably difficult or impossible to later make the changes themselves.[31]

In short, the Carriers' assertions that customers wanted the convenience and flexibility associated with virtually anyone being able to make account changes on their behalf were entirely unsubstantiated and patently self-serving.[32] The ALJ should have found those assertions neither convincing nor evidence, let alone convincing evidence.

---

[30] *See CAD Br.*, p. 21.

[31] *See, e.g., Tr.*, pp. 103-04 (Buckley).

[32] The most that can be said for the Carriers' case is that the stringent anti-slamming protections adopted by the Commission in *Telephone Rule* 2.8.b and elsewhere might make changing service less convenient for some residential customers. Inconvenience is a far cry from unreasonable hardship. Unreasonable hardship warrants relief from unexpectedly harsh effects of a rule's application. Mild inconvenience, on the other hand, was what the Commission was willing to accept in exchange for a reduced incidence of slamming – a far greater evil. Apparently the Commission succeeded: there are very few slamming complaints

Though it does not fall on them to prove that a waiver is not warranted, CAD and Staff proffered evidence demonstrating that the hardship on customers alleged by the Carriers was nonsense. Staff's witness testified that he could not recall a situation in which a person with actual authority to act on the customer of record's behalf was unable to make changes to the customer's account.[33] Moreover, Staff noted that other options exist for customers who want other persons authorized to make changes to their account (*e.g.*, adult children or other individuals made co-customers, providing proof of agency – such as a binding power of attorney – to carriers).[34]

Regrettably, the ALJ was untroubled by the lack of any credible evidence of customer hardship. In fact, the ALJ cited his comments – based on his personal experiences with managing his mother's affairs – in support of his decision to grant the Carriers' waiver requests:

> *Among the most pressing examples supplied at hearing* was the situation where an elderly billed party would prefer an adult son or daughter to deal with the telephone company on their behalf.

Rec. Dec., p. 7 (emphasis added).[35] The ALJ's attempt to vouch his comments as evidence in this proceeding was highly irregular and clearly inappropriate.

---

in West Virginia. *See Tr.*, pp. 135-36 (Fletcher); *see also Verizon-WV Exh.* 2, p. 10.

[33] *Tr.*, pp. 133-34, 136 (Fletcher).

[34] *Id.; see also id.*, pp. 153-55.

[35] Though no citation to the hearing transcript was provided, the ALJ was clearly referring to his comments during exchanges with Staff's witness. *Tr.*, pp. 135-36 (George); *see also id.*, pp. 129-30. Though Verizon-WV referred at times to the adult child/elderly parent scenario once or twice, it simply listed this as one of several examples of the alleged hardship residential customers experience under *Telephone Rule* 2.8.b. *See, e.g., Tr.*, pp. 59-60, 84-85 (Buckley). Nothing in Verizon-WV's testimony at the hearing suggested that this example was "particularly pressing," though in its briefs *Verizon-WV cited to the ALJ's in-hearing comments as evidence in support of its arguments*. *See Verizon-WV Br.*, p. 4.

3. The ALJ Disregarded Valid Concerns About The Continuing Risks To Residential Customers Despite The Carriers' Willingness To Apply The Settlement's "No Questions Asked" Policy.

One key reason the ALJ granted the Carriers' waiver request was their willingness to extend the "no questions asked" provision in the Settlement to situations covered by the waiver.[36] The following passage makes this point clear:

> *In light of the 'no questions asked' policy* offered by the telecommunications carriers, *there really exists little reason to limit the ability of a customer to authorize another adult to make changes in service.*

Rec. Dec., p. 7 (emphasis added). Here again the ALJ erred.

CAD and Staff noted numerous reasons why broadening the scope of persons able to authorize changes for residential service beyond spouses presented problems, despite the Carriers willingness to extend the Settlement's "no questions asked" policy to those situations.[37] The Carriers' witnesses conceded that the "no questions asked" policy would not compensate customers for their time and expense restoring service, assuming they could fully restore their service at all.[38]

Even the ALJ, in a footnote, observed that CAD and Staff raised numerous "valid" concerns regarding whether the "no questions asked" policy would make customers whole if the Carriers' waiver requests were granted. *Rec. Dec.*, pp. 7-8 fn. 5.[39] The ALJ dispensed with CAD and Staff's concerns by

---

[36] *Rec. Dec.*, pp. 6-7; *see Settlement*, ¶ 4, p. 3.
[37] *See CAD Br.*, pp. 23-25; *see also Tr.*, pp. 142-46 (Fletcher).
[38] *See Tr.,* pp. 108-12 (Buckley).
[39] On a somewhat related note, the ALJ scoffed at CAD's fears "that granting this waiver would

concluding that the "negative consequences [of granting the waiver] are . . . much less than if the telecommunications carriers were not pledging to have a 'no questions asked' policy." *Id.* In other words, though the "no questions asked" policy will not make customers whole if Carriers are allowed to process account changes authorized by anyone claiming authority, the "no questions asked" policy took care of the problem.[40] The ALJ's logic is totally circular.

D. The Apparent Authority Conferred By The ALJ Finds No Support in West Virginia Law.

The Carriers claimed they sought to expand the scope of persons authorized to make changes to residential customers' accounts to include any person with "apparent authority" to make such changes. What the Carriers actually sought, however, is not consistent with the concept of "apparent authority" recognized in West Virginia. Though CAD made this point clear, the ALJ ignored it.

---

open up all sorts of Commission precedent and rules to being modified." *Rec. Dec.*, p. 7 fn. 5. Unfortunately, the ALJ completely mischaracterized the nature of CAD's concerns when he suggested those concerns focused on granting the Carriers' waiver requests. What CAD *actually* sought to make clear were their fears regarding the impact on prior Commission decisions and other provisions of the *Telephone Rules* if the ALJ issued a declaratory ruling defining "customer of record" in accord with the Carriers' argument, rather than their waiver requests. *See CAD Br.*, p. 12. While the ALJ's mischaracterization of CAD's concerns may not have affected the outcome, it further highlights the errors the ALJ made in granting the Carriers' waiver requests.

[40] The ALJ also suggested that if the waiver he grants the Carriers creates problems with increased slamming and cramming, "the Commission will end the waiver as soon as possible." *Rec. Dec.*, p. 8 fn. 5. The term of the Settlement, however, is fixed. There is no provision to end the Settlement earlier than twenty months after its effective date (eighteen months plus sixty days for comments), assuming the Commission would issue an order terminating the agreement on the day a petition for such action were filed. Moreover, the ALJ's decision essentially eliminated the consideration underlying the Settlement. CAD and Staff contemplated that there may be an increase in slamming incidents associated with a limited expansion of the scope of persons able to authorize changes to customers' telephone accounts and were willing to agree to an eighteen month trial period to see what effects this expansion might have. CAD and Staff did not bargain for a wholesale abandonment of the "customer of record" limitations in the Commission's *Telephone Rules*.

According to the West Virginia Supreme Court, apparent authority derives from acts or statements by a principal (*i.e.*, the customer) that entitle third persons (*i.e.*, carriers) to believe the agent is acting within his authority.[41] *See Hurt & Assocs. v. Rare Earth Energy*, 480 S.E.2d 529, 536 (W.Va. 1996); *see also Thompson v. Stuckey*, 300 S.E.2d 295, syl. pt. 3 (W.Va. 1983). CAD pointed out that the Carriers' concept of apparent authority is contrary to this authority. The waivers sought by the Carriers would allow them to change a residential customers' service whenever the person authorizing the change claims he or she is authorized to submit the change.[42] In other words, residential customers could have their carrier or service changed, based on nothing the customer has ever said or done to suggest the person authorizing the change is entitled to do so.

The Carriers cite no controlling, West Virginia legal authority that would support adoption of their novel interpretation of "apparent authority." For example, AT&T noted that *federal courts* interpreting the *FCC's slamming rules* recognize that carriers "generally have no way of knowing who the subscribers may have authorized to make changes on their behalf" and that carriers must "depend on the veracity of the person answering the phone."[43] For its part, Verizon-WV echoed AT&T's definition of apparent authority, citing nothing more than general treatises rather than West Virginia court decisions.[44]

---

[41] *CAD Br.*, p. 22 fn. 65; *CAD Reply Br.*, p. 3 fn. 3.

[42] *See Tr.*, pp. 63-64, 101 (Buckley); *see also AT&T Petition*, pp. 11-13.

[43] *AT&T Petition*, p. 11. The decision of a federal court, interpreting federal law, is hardly controlling on the issue of what constitutes "apparent authority" under West Virginia state law.

[44] *See Verizon-WV Br.*, pp. 6-7; *Verizon-WV Reply*, p. 4. AT&T likewise cited some cases dealing with agency as a general proposition. *AT&T Reply*, p. 3. None of those cases relaxed the definition of "apparent authority" established in the decisions cited by CAD.

By endorsing the Carriers' waiver requests, the ALJ turned the principle of "apparent authority" framed by West Virginia's courts on its head.

E. The Commission Should Deny The Carriers' Request For A Declaratory Ruling Broadening The Scope Of *Telephone Rule* 2.8.b Rather Than Remanding The Issue To The ALJ.

Having granted the Carriers' waiver requests, the ALJ deferred ruling on whether to issue a ruling declaring that the term "customer of record" in *Telephone Rule* 2.8.b includes persons claiming authority to act for the customer. The ALJ even noted that granting the Carriers' waiver requests rather than issuing a declaratory ruling was "*by far*, the superior option. . . ." *Rec. Dec.*, p. 6 fn. 1. In light of that observation, it is odd that the ALJ then suggested that *Telephone Rule* 2.8.b ought to be modified. Odder still was the reasoning underlying the ALJ's suggestion.

The ALJ first noted the Carriers' difficulties accommodating themselves to *Telephone Rule* 2.8.b, writing:

> AT&T and Verizon also showed that the companies themselves were troubled by the current rule *as it is interpreted by St*aff. They are required to have separate marketing scripts for their West Virginia customers. They must engage in significant specialized training for their marketing representatives who deal with West Virginia customers.

Rec. Dec., p. 8 (emphasis added). There are several errors in this portion of the ALJ's decision. First, the "customer of record" limitation in the current rule is *not* Staff's interpretation – *it is the limitation expressly contained in the rule itself*.[45] Moreover, the meaning of "customer of record" (*i.e.*, the billed party) is

---

[45] Nor is this "interpretation" Staff's alone. CAD made it quite clear that it too reads the "customer of record" limitation in the rule literally. *See Tr.*, p. 119 (Buckley); p. 182 (Pearlman).

not some harebrained invention of Staff or CAD – it is the meaning assigned the term by industry and the Commission. Second, the ALJ overstated the difficulties the Carriers encountered in complying with *Telephone Rule* 2.8.b, as made clear through cross examination of the Carriers' witnesses and through Staff's testimony.[46]

Next, the ALJ observed that it is not unusual for state regulations regarding utility practices to vary by state. "Such is the nature of federalism," he wrote, noting that "the evidence in this case even demonstrated issues related to this narrow question . . . varied in Texas, Maine and perhaps other jurisdictions." *Rec. Dec.*, p. 8. Further, he observed, "West Virginia is not obligated to conform its rules to be like other states." *Id.*[47] *However, the ALJ then adopted conclusions totally inconsistent with his observations.*

First, the ALJ concluded that "[t]his modification [sought by the Carriers] appears to be in the public interest." *Id.* Then he concluded that "[t]he change would make West Virginia conform to the vast majority of the jurisdictions regarding this particular issue." *Id.* A more schizophrenic line of reasoning is hard to imagine. On the one hand, state utility rules may vary and West Virginia's rules are not obligated to conform to other states' rules. On the other

[46] For example, telemarketing scripts provided in response to discovery indicated that marketing representatives were able to follow a flow chart to ask state-appropriate questions focused on slamming or cramming. *Tr.*, pp. 45-47 (Boyle). In fact, AT&T is able to program state-appropriate questions into interactive voice recognition telemarketing programs. *Id.*, pp. 170-72. Moreover, cross examination of Verizon-WV's witness revealed that the call centers, where the operational and financial burdens of complying with state and federal slamming rules falls, are operated by an affiliate – not Verizon-WV. *CAD Br.*, p. 18; *see also Tr.*, pp. 114-16 (Buckley).

[47] On these points, the ALJ was correct, though CAD notes that West Virginia is not obligated to make its intrastate slamming rules conform to the FCC's interstate slamming rules either.

hand, the public interest warrants conforming West Virginia's rule to other states.

The ALJ does not explain why the public interest warrants modifying West Virginia's rule to conform to other states but presumably it is because the Carriers have to operate differently under West Virginia's rule. That fact, however, is hardly Earth-shattering: There are certain to be a host of West Virginia rules that compel carriers to operate differently in this state than they do elsewhere.

More importantly, the public interest is no more a basis to modify *Telephone Rule* 2.8.b than it is to waive the rule. As discussed above, *Telephone Rule* 1.6.b does not mention public interest and the ALJ's assessment of the "public interest" contradicts the Commission's determinations in adopting stringent anti-slamming rules in the first place.

CAD went to great length to set forth why a declaratory ruling that the term "customer of record" included persons claiming authority to act on behalf of the billed party was inappropriate.[48] Although the ALJ declined to grant the Carriers the declaratory ruling they sought, he made it quite clear that if required to do so, he would – erroneously – rule in favor of the Carriers. There is, therefore, no point remanding this proceeding to the ALJ for a ruling he is certain to get wrong. The Commission should affirmatively: (1) deny the Carriers' request for a declaratory ruling regarding the scope of persons falling within the term "customer of record" in *Telephone Rule* 2.8.b, and (2) affirm the limited scope of the term consistent with its orders entered in G.O. 187.16.

[48] *See CAD Br.*, pp. 5-15.

IV. CONCLUSION.

For all the foregoing reasons, the Commission should enter an order:

(1) Rejecting and vacating the ALJ's decision granting the Carriers a waiver from the "customer of record" requirements contained in Telephone Rule 2.8.b, beyond the scope of the temporary exemption set forth in the parties' Joint Stipulation of Settlement;

(2) Affirmatively denying the Carriers' request for a declaratory ruling expanding the term "customer of record" in Telephone Rule 2.8.b to include persons with apparent authority to act on the billed party's behalf, rather than remanding this issue to the ALJ;

and

(3) Approving the Settlement, as filed by the parties and rejecting the ALJ's modified agreement attached to his decision as Appendix A.

Respectfully submitted this 31st day of January 2005.

CONSUMER ADVOCATE DIVISION

____

PATRICK W. PEARLMAN
Deputy Consumer Advocate
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
304.558.0526; fax 558.3610
WV Bar No. 5755